

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

**Caption in Compliance with D.N.J. LBR 9004-1(b)**

**BROWN McGARRY NIMEROFF LLC**  
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*In re:*

BED BATH & BEYOND INC., *et al.*<sup>1</sup>

Debtors.

Case No. 23-13359 (VFP)

Chapter 11

(Jointly Administered)

**MODE TRANSPORTATION, INC.'S  
OBJECTION TO NOTICE  
TO CONTRACT PARTIES TO  
POTENTIALLY ASSUMED  
EXECUTORY CONTRACTS AND  
UNEXPIRED LEASES**

Mode Transportation, Inc. (“MODE”), by and through its undersigned counsel, hereby objects to the Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases (the “Cure Notice”) [Docket Number 714] as follows:

1. MODE provided transportation and logistics services to Debtor Bed Bath & Beyond Inc.

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<sup>1</sup> The last four digits of Debtor Bed Bath & Beyond Inc.’s tax identification number are 0488. A complete list of the Debtors in these chapter 11 cases and each such Debtor’s tax identification number may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://restructuring.ra.kroll.com/bbby>. The location of Debtor Bed Bath & Beyond Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 650 Liberty Avenue, Union, New Jersey 07083.

2. MODE and Debtor Bed Bath & Beyond Inc. are parties to a Transportation Agreement dated October 19, 2006, together with various addendums and amendments, most recently in 2019.

3. The Cure Notice identifies a contract between Debtors and MODE subject to assumption and assignment with a cure amount of \$106,232.84: Mode - Truckload Amendment 2019 - fully executed.

4. The cure amount listed on the Cure Notice is incorrect. MODE is owed \$334,645.45 related to unpaid pre-petition transportation services. The documentation supporting the cure amount is voluminous and MODE will provide a copy to Debtors' counsel upon request.

### **OBJECTION**

5. Section 365(b) of the Bankruptcy Code requires a debtor to fully cure all defaults existing at the time of assumption before assuming an executory contract and provide adequate assurance of future performance under the contract. *See 11 U.S.C. §365(b)(1); In re Carlisle Homes, Inc.*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988) (“In order for a debtor to assume a contract under § 365(b)(1), it must: (1) cure existing default or provide adequate assurance that cure will promptly occur, 365(b)(1)(A); (2) compensate any party to the agreement that has suffered actual pecuniary loss as a result of default, or provide adequate assurance of prompt compensation to the injured party, § 365(b)(1)(B); and (3) provide adequate assurance of future performance under the agreement before assumption will be permitted, § 365(b)(1)(C).”). This includes both pre-petition and post-petition defaults. *See In re Burger Boys*, 94 F.3d 755, 763 (2d Cir. 1996).

6. The cure amount owing to MODE is \$334,645.45 and not \$106,232.84 as listed in the Cure Notice.

7. Debtors have not provided adequate assurance of future performance under the contracts it proposes to assume and assign. Debtors appear to be relying upon payment of cure costs as evidence of adequate assurance of future performance, but such an argument is circular, and renders moot the separate requirement of § 365(b)(1)(C). [ECF No. 92, Page 11 of 120]. While adequate assurance of future performance falls short of an absolute guaranty of performance, there must be evidence satisfactory to the court that the proposed assignee possesses the financial wherewithal to perform all of the obligations under the agreement at issue. *See In re RS Legacy Corp.*, Nos. 15-10197 (BLS), 1947, 2414, 2015 Bankr. LEXIS 2206, at \*2 (Bankr. D. Del. June 25, 2015).

8. MODE reserves the right to amend, supplement, or otherwise modify this Objection, and to raise further objections to the assumption and assignment or cure amounts with respect to any contract between MODE and Debtors.

**WHEREFORE**, MODE requests that the Court sustain this Objection and grant MODE such additional relief that is just and equitable.

Dated: June 26, 2023

**BROWN McGARRY NIMEROFF LLC**  
**A Pennsylvania Limited Liability Company**

By: /s/ Jami B. Nimeroff

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**CERTIFICATE OF SERVICE**

I, Jami B. Nimeroff, hereby certify that on this 26<sup>th</sup> day of June, 2023 I caused a true and correct copy of the foregoing to be electronically filed with the Court using the CM/ECF System and to be served upon all parties requesting service therefrom. I further certify that I caused a true and correct copy of the foregoing to be served upon the following via electronic mail:

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Dated: June 26, 2023

BROWN McGARRY NIMEROFF LLC

/s/ Jami B. Nimeroff  
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